Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

SYLVIA SCOTT, *et al.*,
Petitioners,

v.

PASADENA UNIFIED SCHOOL DISTRICT *et al.*,
Respondents.

On Petition for Rehearing En Banc to the Ninth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Elements of the First Prong of Article III Standing (Injury In Fact) in an Equal Protection Context be Modified from the Rule Provided by this Court in *North-Eastern Florida Chapter of Associated General Contractors of American v. City of Jacksonville*, 508 U.S. 656 (1993)?

2. Does the Ripeness Doctrine require a party to wait and see the manner in which the Government will carry out a Race and Gender based policy before bringing a facial challenge to said policy?

LIST OF ALL PARTIES

The complete list of the Petitioners is as follows: SYLVIA SCOTT, as guardian ad litem for minors, DETRICK STANDMORE, KAYLA HUNTER, MICHAELA REYES, and RONALD RUCKER; RENÉ AMY, as guardian ad litem for minors, CAMDEM RENÉ AMY and MARISSA LARAINE AMY; GEORGE FRANCIS MACPHERSON and SILVIA JIMENEZ MACPHERSON, as guardian ad litem for minor, GEORGE GORDON MACPHERSON; ROMEO ALVA, as guardian ad litem for minor, JOCELYNE ALVA (collectively referred to as "Scott" or "Petitioners.")

The complete list of the Respondents is as follows: PASADENA UNIFIED SCHOOL DISTRICT; GEORGE VAN ALSTINE; GEORGE PADILLA; JACQUELINE JACOBS; BONNIE ARMSTRONG; LISA FOWLER; VERA VIGNES; in their individual and official capacities, and JOSEPH WHITE ASSOCIATES * (collectively referred to as "PUSD" or "Respondents).

To Petitioners' knowledge, there are no parent companies or non-wholly owned subsidiaries of the parties.

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* Joseph White Associates was voluntarily dismissed by Scott in the District Court.

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS TO OPINIONS AND ORDERS ENTERED IN THE CASE

The denial of *en banc* review by the United States Court of Appeals for the Ninth Circuit appears in Appendix A to this Petition. The published Opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix B to this Petition. The order, findings of fact, judgment, and sua sponte orders of the District Court denying PUSD's motion for summary judgment and granting Scott's motion for summary judgment appear in Appendices C through F, respectively, to this Petition.

STATEMENT OF JURISDICTIONAL BASIS

Title 28, U.S.C. § 1254(1), provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of

certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THE CASE.

Article III, Section 2 of the U.S. Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Fourteenth Amendment states, in pertinent part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 31 of the California Constitution states, in pertinent part,

> (a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

STATEMENT OF THE CASE

PUSD is a public school district which operates three voluntary schools. Pursuant to its integration policy, to gain admittance to said schools, a pupil must submit an application which is then used in a lottery to assign students to open seats as per the Board Policy ("BP") 0460(c)(7). The integration policy states, in pertinent part, as follows: "When necessary to create an integrated setting, consideration will be given during the student assignment process to several factors, including gender, race or ethnicity. . . ." BP 0460(d)(8). According to the integration policy, it becomes "necessary to create an integrated setting" at sites where "the number of students in any major ethnic group varies from the percentage of such students in the overall district student population by +/_20%." BP 0460(c)(3). At these locations, "no additional permits or transfers from this group may be granted into these sites." BP 0460(c)(3).

The lottery application requires racial and gender self-identification. As to how racial parameters operate relative to the lottery, the policy states, "[i]n assigning students to a voluntary or magnet school, the lottery process *shall* utilize the parameters set forth in this policy to promote an integrated setting." BP 0460(c)((7) (emphasis added).

It is Scott's position that the integration policy is inconsistent with the equal protection clause of the Fourteenth Amendment, as well as Article I, Section 31 of the California Constitution, as she cannot apply to 100% of the seats as a result of the uncontrolled circumstance of race. *Regents of University of California v. Bakke*, 438 U.S. 265, 281, footnote 14 (1978).

Scott applied to the voluntary schools prior to the use of the lottery. The Scott children are black, Hispanic, white and multiracial. After the suit was filed, the lottery was held and one of the plaintiff children (MacPherson) was not selected.

In declarations filed in support of summary judgment, each of the Scott plaintiff-parents asserted that they intend to submit applications to voluntary schools for their children for the coming years into the foreseeable future.

The District Court ruled for Scott in a motion for summary judgment finding that "[t]he racial and ethnic classifications embodied in BP 0460 do not serve a compelling government purpose nor are they narrowly tailored." The Ninth Circuit did not reach the merits of the case. Instead, it reversed the District Court asserting that Scott lacked standing and that the case was not ripe.

ARGUMENTS AMPLIFYING AND SUPPORTING WRIT

The only issue as to standing in the present Petition is that of "injury in fact." As such, the key issues as to standing are whether there has been (1) a factual representation that the complaining party is ready and able to apply for an open seat into the foreseeable future; and, (2) whether the school's integration policy authorizes the use of the racial and gender set-asides.

The issue as to ripeness is whether a policy which provides or withholds benefits based upon race and gender can be facially challenged. Or, as a prerequisite, must a party wait an indefinite amount of time to see how the policy is carried out by the government prior to bringing such a facial challenge? Essential to that issue is whether the government can execute an unconstitutional law in a constitutional manner.

I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH SUPREME COURT OPINIONS RELATIVE TO STANDING IN THE EQUAL-PROTECTION CONTEXT.

There is no debate that Article III standing is required for a federal court to have jurisdiction. Further, there can be no serious dispute that the elements for standing are threefold as follows: (1) injury in fact; (2) the injury must be traceable to the challenged action of the defendant; and, (3) the injury is remediable by appropriate court action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is the "injury in fact" prong of the *Lujan* test which is at issue between the parties and on which Scott asserts that the Ninth Circuit made profound errors of law.

Petitioners disagree with the Ninth Circuit as to how the three-pronged *Lujan* test is applied in the context of an equal protection case. The Ninth Circuit asserts that the application of the *Lujan* test is analyzed in the same manner for claims involving the First Amendment and even criminal cases as it is in the equal protection context. As such, the Ninth Circuit erroneously erected additional barriers to standing than those articulated by this Court in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). Specifically the Ninth Circuit asserted that the "injury-in-fact" element of standing requires an "imminent threat of enforcement." The Ninth Circuit's basis for this position is *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000).

In support of the Ninth Circuit's erroneous assertion that the "injury-in-fact" element of standing requires an "imminent threat of enforcement," the court applied the three-pronged test found in *Thomas* as follows:

> First, the plaintiff must articulate a "'concrete plan' to violate the law in question." [*Thomas*] 220 F.3d at 1139 . . . Second, a plaintiff may satisfy the injury-in-fact

> requirement by demonstrating that government officials "have communicated a specific warning or threat" of enforcement . . . Third, the Thomas panel held that a claim for prospective relief can be based on a history of discriminatory enforcement of the challenged governmental policy, but the absence of such a history will support a conclusion that a potential injury is not imminent. 220 F.3d at 1140. *Scott*, at 13098.

As an initial matter, it should be noted that *Thomas* was a case dealing with First Amendment religious and speech rights rather than equal protection. The analysis is different for purposes of standing when a case is brought under these two distinctive rights. In essence, a cause of action for violation of the rights to free speech and exercise of religion involves a claim that the government has passed a law or has a policy which prevents the claimant from communicating ideas or engaging in religious practices. A complaint based upon equal protection asserts that the government has erected a barrier making it more difficult for a claimant to seek a benefit than it is for others.

Scott asserts that the three-pronged *Thomas* test differs significantly from the analysis in *Northeastern Florida*. Thus, reliance on *Thomas* is misplaced.[1]

It is necessary to compare and contrast *Thomas* with *Northeastern Florida*. The first prong of *Thomas* is that there is a concrete plan to violate the law. *Thomas*, *Id.*, 1139. The Scott panel found that,

> Scott presented affidavits before the district court representing the intentions of individual plaintiffs to apply to PUSD voluntary schools during the earliest

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[1] Interestingly the Court of Appeal actually cites *Northeastern Florida* but then analyzes the facts in Scott relying exclusively on nonequal protection case-law, which applies different standards for standing. In other words, the court did not look to see if the facts in Scott fit the stated rule for standing found in *Northeastern Florida*.

> available application cycle. However, a pledge of general intent to place oneself within the purview of a challenged policy that fails to "specify . . . under what circumstances" that policy might be enforced will "not rise to the level of an articulated, concrete plan." (Quoting *Thomas*, *Id.*, 1139.) *Scott*, at 13107.

In contrast, the rule in *Northeastern Florida* is that a party need merely show that he is ready and able to make application for the benefit. *Northeastern Florida*, *Id.*, 666. In the present case, not only is Scott ready and able to apply, but Scott has stated "I intend to submit applications to the appropriate voluntary schools for my foster children for the coming years into the foreseeable future." Declaration of Sylvia Scott, ¶ 7, Excerpt of Record ("E.R.") 408.[2] Indeed, in the present case, there are three voluntary schools (Don Benito K-5, Norma Coombs Alternative School K-8, and Marshall Fundamental 6-12). The Ninth Circuit found that plaintiff children George MacPherson and Detrick Standmore "remain eligible to apply to PUSD's voluntary schools in the future." *Scott*, at 13102. As these children remain eligible to apply to the voluntary schools for years to come, and their parents have submitted declarations stating that they will submit applications for these children for open seats at the voluntary schools into the foreseeable future, the "injury-in-fact" requirement of standing is established as a matter of law under *Northeastern Florida*. *Id.*, 666.

Further, unlike the standing analysis for First Amendment purposes described in *Thomas*, the "injury in fact" occurred at the time that Scott submitted her application prior to the filing of the First Amended Complaint and the lottery. Of course, the issue of standing is determined by the facts at the time the

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[2] Each of the parents of the plaintiff children submitted declarations which make the same affirmation, (see, Declaration of Amy, ¶ 15, E.R. 407; Declaration of MacPherson, ¶ 12, E.R. 405; Declaration of Alva, ¶ 5, E.R. 415.)

complaint is filed. *Newman-Green, Inc. v. Alfonzo-Larrian*, 490 U.S. 826, 830 (1989).[3] Moreover, in complete contrast to the rule in *Thomas*, the "injury in fact" occurs every time that Scott submits an application. Being forced to compete on an unequal basis because of race (or sex) is an injury under the equal protection clause. *Northeastern Florida, Id.*, 666.

As this Court has made it clear, the "injury-in-fact" prong of standing in equal-protection analysis is not the "imminent threat of enforcement," as the Ninth Circuit has erroneously asserted. *Scott*, at 13103. It occurs when an application for a benefit is submitted. In Scott, this first occurred prior to the filing of the First Amended Complaint and will occur into the foreseeable future every time that Scott submits an application in which she cannot apply to 100% of the open seats due to the uncontrolled circumstance of race or gender. *Bakke*, Id., 281.

The second prong of *Thomas* is that a plaintiff may satisfy the "injury-in-fact" requirement by demonstrating that government officials have communicated a specific warning or threat of enforcement. The panel stated, "PUSD has given no indication that it intends to apply a weighted factor in any future lottery." *Scott*, at 13108. The Ninth Circuit has made a new, burdensome and legally-flawed test for standing purposes in an equal protection context.

It should be noted that the ordinance at issue in *Northeastern Florida* did not *require* the use of set-asides, it merely *authorized* them. In like manner, the policy at issue here does nothing less. As *Northeastern Florida* shows, the relevant question is not whether a statute "requires" the use of such measures, but whether it "authorizes" or "encourages" them. In the present case, even if one were to liberally

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[3] It is worth noting that, despite this fundamental rule which distinguishes mootness from standing, the Ninth Circuit frequently discussed post filing facts in its opinion.

construe the facts in favor of PUSD, as the Ninth Circuit did, the issue is not whether in practice PUSD *required* the use of race or gender, but, rather, whether the policy in question *authorized* said use. It is not subject to reasonable dispute that the policy, on its face, authorizes the use of race and gender. The policy states, in pertinent part, as follows:

> At sites where the number of students in any major ethnic group varies from the percentage of such students in the overall district student population by +/_20%, no additional permits or transfers from this group may be granted into these sites. BP 0460(c)(3).[4]

Further, as the Ninth Circuit observed, "PUSD Superintendent Vignes has stated that race or ethnicity would be applied as an admissions factor only under 'compelling' circumstances 'where [a] school was so racially identifiable that it was a segregated school or was fast moving in the direction of becoming a segregated school.' Decl. of Vera Vignes (Jan. 24, 2000) ¶ 11." *Scott*, at 13109. In view of the plain meaning of the integration policy, as well as, the statement by the Superintendent, the use of race is unquestionably "authorized." The *Thomas* analysis, again, is inconsistent with *Northeastern Florida*.

The third prong of *Thomas* is that a claim for prospective relief can be based on a history of discriminatory enforcement

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[4] The Ninth Circuit panel complained that certain sections of the PUSD integration policy (BP 0460) were not properly raised as issues in the opening brief or in the District Court. This is simply a blatant misreading of the record. BP 0460 was attached as an exhibit to the complaint; it appears twice in the record; it was thoroughly briefed by both parties in their primary briefs as well as the numerous *amici*; in the conclusion of the District Court's order, it BP 0460 was broadly described as follows: "The racial and ethnic classifications embodied in BP 0460 do not serve a compelling government purpose nor are they narrowly tailored."; and, numerous sections of BP 0460 were quoted verbatim in the findings of law and conclusions of fact. It is baffling that the panel could conceivably assert that any portion of BP 0460 was not properly before it.

of the challenged governmental policy, but the absence of such a history will support a conclusion that a potential injury is not imminent. *Thomas, Id.*, 1140. No such requirement is found in *Northeastern Florida*. As per *Northeastern Florida*, an injury results not only when the applicant actually is not provided a seat because of gender or race, but every time the student simply submits an application.

In *Bakke*, an applicant for medical school was denied admission because he was white. This Court held that said denial constituted the requisite injury because Bakke was not "permitted . . . to compete for all 100 places in the class simply because of his race." *Bakke*, Id., 281 footnote14. In addition, this Court stated that "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing." Id.280-81 footnote14. Just as Bakke and the contractors in *Northeastern Florida* suffered injury in fact because they were denied equal protection, so too, Scott has suffered injury in fact. The Ninth Circuit attempted to distinguish the "injury-in-fact" rules by asserting that "the mere existence of the admissions policy, standing alone, is insufficient to satisfy the requirement of Article III standing and that, therefore, we lack jurisdiction over Scott's state and federal claims." *Scott*, at 13097. In support of this, the court relied on nonequal-protection cases which were decided a decade before *Northeastern Florida*.[5]

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[5] "The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III. *Stoinaff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983); *Western Mining Council v. Watt*, 643 F.2d 618, 627 (9th Cir. 1981); see also *Thomas*, 220 F.3d at 1139 (stating that "neither the mere existence of a prospective statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement.") . . . *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)." *Scott*, 13101. Not only were these cases decided prior to *Northeastern Florida*, they generally did not involve equal protection

As explained above, this denies the salient facts in this case that Scott submitted applications for seats at the voluntary schools and intends on submitting applications for the coming years into the foreseeable future. As a matter of law, this brings Scott fully within the sphere of standing in an equal-protection case as per *Northeastern Florida*. Until now, no other circuit has added additional elements to the stated rule for standing found in *Northeastern Florida* in an equal-protection context. The Fourth, Seventh and Tenth Circuits have all applied the *Northeastern Florida* rule in a straight-forward manner. See, *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 09/03/1996); *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 01/09/1995); *Clajon Production Corp. v. Petera*, 70 F.3D 1566 (10th Cir. 11/20/1995). The Ninth Circuit has now brought uncertainty by erecting additional barriers to standing as it relates to equal-protection causes of action. The granting of this Petition is necessary to bring back uniformity on this important constitutional issue.

II. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH SUPREME COURT OPINIONS ADDRESSING RIPENESS IN THE CONTEXT OF A FACIAL CHALLENGE TO A RACE AND GENDER-BASED LAW.

The Ninth Circuit also ruled that the case is not ripe. Once PUSD has enacted a race and gender-based policy, said policy must articulate a narrowly-tailored compelling state interest. At issue is, if the school district's integration policy does not have a narrowly-tailored compelling state interest, as stated on its face, must Scott wait an indefinite amount of time to see if PUSD will carry out the unconstitutional policy in a constitutional manner? More to the point, can the government carry out an unconstitutional law, which it has

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issues. The exception is *Lyons* which mentioned, as *dicta* in a footnote, that a cause of action was brought under the equal protection clause.

enacted, in a constitutional manner? Scott asserts that, for purposes of equal protection analysis, to do such is an impossibility. Thus, a facial challenge to the law is not legally premature.

In contrast, the Ninth Circuit asserts that a facial challenge to a racial policy is improper. "'[A] rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test.'" *Scott*, at 13113 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989), Justice Kennedy concurring). First, this implies that it is Scott's position that every policy based upon race is automatically invalid. The briefs submitted by Scott state otherwise. In sum, it is Scott's position that a race based policy must be based upon a narrowly-tailored compelling state interest. *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 227 (1995). Thus, if a written law facially fails the narrowly-tailored compelling state interest test, a "case-by-case" wait-and-see stance would be a frivolous undertaking.

Second, the Ninth Circuit's reliance on *Croson* is misplaced. It is incorrect that either the majority opinion in *Croson*, or Justice Kennedy's concurring opinion, proffered that relief should be denied in a facial challenge to a race based law for lack of ripeness. No where in *Croson* is that stated or implied.

Third, the "case by case test" refers to whether the law in question is narrowly drawn to achieve a compelling state interest. *Croson, Id.*, 498. It is not a wait and see posture. As the litigants in *Croson* did, a party can bring a facial challenge to a race-based law. *Croson, Id.*, 483. It is Scott's position that when a governmental body is defending a racially-based policy, the burden of justification falls on the government. A "generalized assertion" of past discrimination and present effects does not meet that burden. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989).

Moreover, the mere recitation of a remedial purpose "is entitled to little or no weight." *Id.* at 500. Simply put, racial classifications are suspect and assurances of good intentions "cannot suffice." *Id.* at 500. The Ninth Circuit's ruling in *Scott* has it backwards. It would place the burden on the plaintiff to show that the race-based policy has been shown over time to be constitutionally infirm. This is a dangerous liberty that the Ninth Circuit is giving to the government in the volatile area of race.

Thus, the Ninth Circuit's refusal to accept a facial challenge to the policy and requiring Scott to wait and see if PUSD will act in a manner which demonstrates a narrowly-tailored compelling state interest, is an attempt to insert a new rule for ripeness which is inconsistent with *Croson* and *Northeastern Florida.*

Further, in finding that the case was not ripe, the Ninth Circuit stated: "As a prudential matter, we will not consider a claim to be ripe for judicial resolution if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scott*, at 13111 (inner quotation marks omitted). Relying on the language in *Warth v. Seldin*, 422 U.S. 490, (1975), the City of Jacksonville proffered identical reasoning in *Northeastern Florida.*

> The complaint refers to no specific project of any of [the association's] members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit . . . with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by [the association's] members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, [the association] has failed to show the existence of any

> injury to its members of sufficient immediacy and ripeness to warrant judicial intervention. *Northeastern Florida*, *Id.*, 667, quoting *Warth*, at 516.

This Court distinguished the reasoning by the City of Jacksonville as to ripeness and reversed the appellate court stating,

> the construction association in *Warth* did not allege that "any member had applied . . . for a building permit or a variance with respect to any current project." [*Warth*] *Id.*, at 516. Thus, unlike the association in *Warth*, petitioner has alleged an "injury . . . of sufficient immediacy . . . to warrant judicial intervention."

Like the petitioner in *Northeastern Florida*, Scott clearly did apply for open seats and has unequivocally stated that she intends to submit applications for all open seats in the future. Thus, the Ninth Circuit's reasoning on ripeness is again inconsistent with the decision in *Northeastern Florida*.

Finally, the Ninth Circuit's new wait-and-see rule will work as a prohibition against bringing a challenge to a written law which is unconstitutional on its face. In the present case the integration policy expresses no compelling state interest. Even if there was an unstated compelling state interest present, the policy is not narrowly-tailored. For example, it does not address any of the five prongs of the test for narrow tailoring articulated in *United States v. Paradise*, 480 U.S. 149, 171 (1987). Rhetorically, one must ask, why should a party be forced to wait and see how the government will carry out a race-based law which, on its face, is not narrowly-tailored?

In like manner, the integration policy also runs afoul of the much stricter provisions of California's Constitution. Section 31 of Article I of the California Constitution prohibits the government from discriminating against, or giving benefits to, any person on the basis of race or gender. "The State shall not discriminate against, or grant preferential treatment to,

any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CA Const., Art I, § 31.

The integration policy facially discriminates against those children who are part of a racial or ethnic group who make up a larger part of the applicant pool to the voluntary schools than they do the district as a whole, i.e., they are part of an applicant pool which trespasses the mandatory +/-20% racial boundaries. Conversely, those students who fall within the +/-20% racial parameter test are given a benefit by the government solely because of their race. It may not be known in any given year which race or ethnic group will be affected. But, the inescapable reality is that the policy inherently provides benefits, and also discriminates, based upon race in violation of the California Constitution.

In view of the blatant facial problems inherent in this integration policy, the question must be asked, can a facially unconstitutional law be executed in a constitutional manner? Surely not. However, the Ninth Circuit's new prohibition on facial challenges makes the presumption that unconstitutional laws can be carried out constitutionally. Scott asserts that the Ninth Circuit has created a dangerous presupposition. As such, it asks this Court to grant review.

CONCLUSION

The Ninth Circuit's published opinion in *Scott*, if allowed to stand, will create confusion because it adds elements for standing in an equal protection context which are inconsistent with *Northeastern Florida*. Moreover, by doing so, it has created a conflict among the circuits in this area of standing. Finally, by asserting that this case lacks ripeness, the Ninth Circuit has now prevented a party from bringing a facial challenge to written law. In essence, the Ninth Circuit has now created a bright line rule that a party must take a "wait-

and-see approach" to a facially-invalid policy. This is not only inconsistent with this Court's ruling in *Northeastern Florida*, it presumes that the government can execute an unconstitutional law in a constitutional manner.

For the foregoing reasons, Scott respectfully requests that this Petition be granted. In the alternative, Scott requests that the case be remanded back to the Ninth Circuit for review which is consistent with the opinion in *Northeastern Florida*.

Respectfully submitted,

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